

Message

From: Ozone Implementation Team [no-reply@sharepointonline.com]
Sent: 8/31/2017 2:30:04 PM
To: Svingen, Eric [Svingen.Eric@epa.gov]
Subject: Ozone in the News - EPA Fights 'Speculative' Bid To Vacate...

 EPA Fights 'Speculative' Bid To Vacate... has been added



Mackintosh, David

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Title: EPA Fights 'Speculative' Bid To Vacate Ozone NAAQS Designations Delay

Body:

EPA Fights 'Speculative' Bid To Vacate Ozone NAAQS Designations Delay

August 30, 2017

EPA is fighting several states' request for a federal appeals court to vacate the agency's since-withdrawn notice delaying by one year designations for which areas are attaining the 2015 ozone air standard, saying it is "speculative" for the states to say the delay was unlawful and that EPA should be prevented from trying it again.

"Petitioners' concern that the withdrawal could be reversed by the Court in some future action is highly speculative, and could be adequately addressed by the Court in its review of any such future action. Accordingly, that speculation provides no basis for the Court to reach out and vacate an action that the Agency has already withdrawn," EPA says in [an Aug. 29 filing](#) with the U.S. Court of Appeals for the District of Columbia Circuit.

EPA is responding to separate filings from environmentalists and a coalition of Democratic-led states about how to proceed in consolidated litigation over agency Administrator Scott Pruitt's now-scrapped notice saying emissions data gaps justified delaying the ozone designations from October this year until October 2018.

Pruitt issued the one-year delay on June 6, saying it was vital to allow more time to assess the data that the Obama administration used to justify tightening the ozone limit from the 75 ppb level set in 2008 down to 70 ppb. But on Aug. 2, after environmentalists and states sued to overturn that delay and reinstate the original deadline for the designations, Pruitt withdrew his letter through a *Federal Register* notice and said the review could instead be completed this year. EPA asked the court to then dismiss the case, which environmentalists and the states are opposing.

Environmentalists want to continue the case to challenge the delay on its merits, while the states say that if the D.C. Circuit dismisses the case then it should [vacate the delay as unlawful](#) to prevent EPA reviving it.

EPA's new filing reiterates the agency's arguments that the case is moot because the agency has withdrawn the notice, and says the suit must be dismissed. The case "is a petition for judicial review of a discrete agency action that the Agency has now formally withdrawn. There is no ongoing course of action for the Agency to resume," EPA says, downplaying environmentalists' fears that EPA could reinstate the delay.

If "EPA decides at a future time that a new extension of the designation deadline is appropriate for one or more areas, it will have to take a new discrete action to promulgate such an extension, which will be based on the particular record for that extension," EPA says. Environmentalists would have to challenge that specific action, EPA says, and it is "speculative" to assume that the D.C. Circuit would rule against the delay.

"Furthermore, because the extension was withdrawn prior to the pre-existing deadline for extensions, which is now back in effect, it did not cause any harm to Petitioners and cannot cause any harm to Petitioners in the future. Thus, there is no harm or effect of the challenged action for the Court to remedy."

Observers say EPA will likely miss its reinstated Oct. 1 deadline for designations, as it has not taken necessary administrative steps to achieve it, such as informing states of which areas it thinks should be in nonattainment. Nonetheless, the agency in the new filing says "the original deadline for designations is currently in effect."

Should the agency miss this deadline, environmentalists have already indicated they will likely file a fresh lawsuit to force release of the area designations as soon as possible. -- Stuart Parker (sparker@iwpnews.com)

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